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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,
8 Plaintiff,

9 -vs-

10 ANTOINE M. MERCADEL,
11 Defendant.

NO. CR-94-0260-WFN-1

ORDER ON DEFENDANT'S
MOTION FOR REDUCTION OF
SENTENCE AND DEFENDANT'S
APPLICATION FOR
APPOINTMENT OF COUNSEL

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13 Before the Court is (1) Defendant's Motion for Reduction of Sentence Pursuant to
14 18 U.S.C. § 3582(c)(2) (ECF No. 173), and (2) Defendant's Ex Parte Application for
15 Order Appointing Counsel (ECF No. 172). The Government has responded to Defendant's
16 Motion for Reduction of Sentence. Defendant did not file a reply. The Court now denies
17 Defendant's Motions for the reasons stated below.

18 **BACKGROUND**

19 Defendant was indicted on November 2, 1994, and charged with (1) possession with
20 intent to deliver over 50 grams of cocaine base and (2) distribution of cocaine base (ECF
21 No. 1). On March 3, 1995, the Government filed notice that Defendant had a prior felony
22 drug offense.

23 Currently, Defendant incorrectly states in his Motion that he pled guilty (ECF No. 173
24 at 4). In fact, he went to trial and was convicted on both counts. Subsequently, Defendant
25 filed numerous post-trial motions. On November 17, 1995, Defendant was sentenced.
26 Defendant's base offense level was 32 with a criminal history category of VI. The guideline

1 range was 210 to 262 months imprisonment, with a mandatory minimum term of 240 months
2 imprisonment (ECF No. 86). Defendant was sentenced to the mandatory minimum of
3 240 months imprisonment, with 10 years of supervised release to follow. Defendant
4 appealed and the Ninth Circuit affirmed.

5 On March 17, 2008, Defendant filed a Motion to Appoint Counsel, to assist him in
6 filing a motion for retroactive application of sentencing guidelines for a crack cocaine
7 offense (ECF No. 148). Defendant's Motion was granted and counsel was appointed.
8 However, no motion was filed until June 16, 2009, when Defendant filed his *pro se* Motion
9 (ECF No. 154). On July 6, 2009 Defendant's Motion was denied (ECF No. 156). Defendant
10 appealed and the decision was affirmed in 2010. On July 23, 2012, Defendant filed his
11 present Motions requesting the reduction in sentence and appointment of counsel.

12 **APPLICABLE LAW**

13 Normally, a court may not modify a term of imprisonment once it has been
14 imposed. . . . 18 U.S.C. § 3582(c). However, modification of a term of imprisonment is
15 allowed "in the case of a defendant who has been sentenced to a term of imprisonment based
16 on a sentencing range that has subsequently been lowered by the Sentencing Commission
17 pursuant to 28 U.S.C. 994(o). . . ." 18 U.S.C. § 3582(c)(2). Nevertheless, a defendant is
18 ineligible for a term of imprisonment modification where the amended guideline range "does
19 not have the effect of lowering the defendant's applicable guideline range because of the
20 operation of another guideline or statutory provision (*e.g., a statutory mandatory minimum*
21 *term of imprisonment*).\" U.S.S.G. § 1B1.10, Application Notes 1(A) (emphasis added).

22 **DISCUSSION**

23 The Court begins by noting that this is Defendant's second Motion requesting a
24 reduction to his sentence pursuant to 18 U.S.C. § 3582(c)(2). Presently, Defendant states that
25 under the Fair Sentencing Act of 2010 [FSA], Defendant's amended guideline range is 120
26 to 150 months. Accordingly, Defendant requests a 120 month sentence. However, as the

1 Government succinctly states, Defendant is ineligible for a reduction in sentence because
2 he was sentenced to the mandatory minimum. *See United States v. Sykes*, 658 F.3d 1140
3 (9th Cir. 2011) (holding the district court lacked the discretion to reduce defendant's sentence
4 below the mandatory minimum); *United States v. Mullanix*, 99 F.3d 323 (9th Cir. 1996);
5 *United States v. Jackson*, 577 F.3d 1032, 1034 (9th Cir. 2009).

6 Having predicted the Government's position, Defendant argues that the Supreme
7 Court recently concluded that lower minimum sentences of the FSA apply retroactively to
8 offenders who were sentenced before August 3, 2010, the effective date of the FSA.
9 Defendant cites to *United States v. Dorsey*, 32 S. t. 2321 (2012). Defendant is incorrect. As
10 the Government points out, *Dorsey* stands for the position that the FSA's lower mandatory
11 minimums only apply to offenders who were sentenced after the effective date of the FSA.
12 *Id.* at 2335. As Defendant was sentenced in 1995, the FSA does not retroactively change
13 Defendant's mandatory minimum sentence. Consequently, Defendant's Motion fails.

14 Given Defendant's proclivity for filing motions in lieu of or in addition to appealing
15 (see ECF Nos. 50, 51, 63, 65, 145, and 162), the Court takes this opportunity to inform
16 Defendant that it is not inclined to further entertain motions for reconsideration or motions
17 to alter or amend the Court's order denying his Motion for Reduction of Sentence.
18 Accordingly,

19 **IT IS ORDERED** that:

20 1. Defendant's Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c)(2),
21 filed July 23, 2012, **ECF No. 173**, is **DENIED**. If a certificate of appealability is required,
22 it is likewise **DENIED**.

23 2. Defendant's Ex Parte Application for Order Appointing Counsel, filed July 23,
24 2012, **ECF No. 172**, is **DENIED AS MOOT**.

25 The District Court Executive is directed to file this Order and provide copies to
26 counsel and to Defendant.

DATED this 15th day of November, 2012.

11-13-12

s/ Wm. Fremming Nielsen

WM. FREMMING NIELSEN
SENIOR UNITED STATES DISTRICT JUDGE